No. 7829

United States Circuit Court of Appeals

For the Ninth Circuit

ANTONIO ROCCHIA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE.

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STATEMENT OF CASE.

This is an appeal by Antonio Rocchia, hereinafter designated "appellant", one of three defendants named in an indictment returned by the Grand Jury of this District on November 14, 1933 and charging, in the first six counts thereof, violations of the Internal Revenue laws,* and in the Seventh Count,** conspiracy to violate said laws, to-wit, to unlawfully

*R. S. 3258 (26 U. S. C. 281); R. S. 3259 (26 U. S. C. 282), R. S. 3260 (26 U. S. C. 284); R. S. 3281 (26 U. S. C. 306); R. S. 3282 (26 U. S. C. 307).

**R. S. 5440 (18 U. S. C. 88).

possess and operate a distillery in violation of the Internal Revenue laws of the United States and to manufacture, possess and sell intoxicating liquors in violation of the National Prohibition Act. As to this latter count the jury was unable to reach an agreement. The appellant Rocchia, the only defendant on trial, was convicted on the first six counts of the indictment.

QUESTIONS PRESENTED.

(1) Was appellant's Motion to Suppress Evidence properly denied by the District Court, and

(2) Did the appellant have a fair and impartial trial?

THE FACTS.

From the testimony as evidenced at the hearing on the Motion to Suppress Evidence (Tr. 80 to 87 inc.) and at the trial hereof, the facts may be summarized as follows: On January 9, 1933, William P. Goggin, John M. Burt and Keith De Kalb, Investigators of the Department of Justice, made an investigation of the premises in question and known as 60 Brady Street in San Francisco, after Investigator Goggin informed the other two officers that he had just received information from a reliable source that a distillery was unlawfully in operation at said address. Their investigation centered on these premises at

about 4:30 in the afternoon of that day. As the officers approached the building they each observed a strong odor of fermenting mash and distillation which became stronger as they neared the building; that as they neared the building they also observed the hum of motors and the roar of a gas burner operating under pressure; that the officers had each had previous experiences in investigating and seizing illicit distilleries while in operation and arresting the operators thereof, and that from this experience coupled with the smell and sounds emanating from the building they knew that a distillery was in operation therein. They further testified that the building was a concrete warehouse type structure approximately 50 feet wide by 100 feet deep; that it bore a sign to the effect that the premises were being used in a drayage business, and that there was no sign evidencing it to be a licensed distillery as required by law;* that before entering the building they went down the first street intersecting Brady Street which put them in a way alongside of the building and to the rear thereof; that the front of the building contained a large sliding door in the center of the building through which trucks or other large vehicles might enter or leave, and that close by was a small doorway. They further testified that the large sliding door was not locked nor fully closed; that looking through the window in that large door the officers could observe a partition stretching across the building approximately 25 feet back of

*(R. S. 3279; 26 U. S. C. 303).

the entrance, which partition appeared to contain another large doorway, almost totally obscured by a pile of cartons in front thereof, and through the top portion of this doorway they could observe that the portion of the building back of the partition was lighted. They also observed that the portion of the building between the street and the partition just mentioned was likewise sub-divided by a partition running from the front of the building back to the partition separating the lighted portion of the building.

The officers entered the building through the sliding door and entered the distillery portion of the building by way of doors two and three as shown in Exhibit 1, these doors leading respectively through the two partitions mentioned in the front portion of the building, and found a large alcohol distillery in full operation and arrested the operator, Frank Ferrari. At the time of the arrest the distillery was comprised of a 500 gallon still and a 250 gallon still, and was capable of producing between 500 and 1000 gallons of alcohol per day; that the distillery likewise contained aside from the ordinary machinery, hoses, vats, etc. approximately 30,000 gallons of corn sugar mash and 1000 gallons of alcohol and whiskey.

About 6:00 oclock on the same evening one Silvio Cappi entered the building with the use of a key through the small front door and was proceeding towards the portion of the building wherein the stills were located when he was arrested by the officers. The key found on his person fitted the door to the building and was identical with that found on defend-

ant Ferrari (Exhibits 4 and 5). Shortly thereafter two of the officers left with their prisoners, and investigator Burt remained in charge of the seizure. He left the lights of the distillery burning and left a blower or fan in operation. About 8:10 o'clock of that evening and while he was in the front portion of the building, which was in darkness, he observed a man on the sidewalk and heard him insert a key into the lock of the small door and saw him enter the building and proceed to the rear where the distillery was located. He was arrested by officer Burt and questioned and searched in the distillery and found to have a key (Exhibit 6) identical with Exhibits 4 and 5, together with numerous documents and a large quantity of currency. This person was appellant, who at that time gave the name of John Caruso, although documents were found in his possession which would indicate that his true name was Antonio Rocchia. Investigator Burt retained all documents but returned the currency to appellant. From the time of his arrest until the return of Officers Goggin and De Kalb, appellant sought to obtain his release from Investigator Burt by the payment of money, making various offers until he had offered all but $50 of approximately $1600 found on his person. He offered, also, to make regular payments for protection thereafter. Appellant was questioned by the officers prior to leaving the distillery and refused to answer any questions other than to say that his name was John Caruso and to deny that he had any connection with the still. He also stated that he met a man on Third Street who gave him the

key and told him that he might find a job at these premises although he did not claim to know what kind of a job it might be (Tr. 127).

The evidence shows that the premises were rented to a man who gave the name of Joseph Rossi by one William Elligeroth, an employee in the real estate office of Sam McKee & Co. The owner of the building, Axel L. Thulin, identified Exhibit 13 as his copy of the lease for said building covering the period when the distillery was seized. The evidence further shows that Mr. Elligeroth negotiated the lease for him, and that the lease when presented to him by the real estate company for signature had already been signed by the lessor whom he had never met. He further testified that all payments, under the terms of the lease by lessor, were made to him through the real estate company, that he never saw appellant and knew nothing of what was going on at the building inasmuch as he had not visited it subsequent to its being leased through Elligeroth.

Inspector Van Husen of the San Francisco Water Department, testified to having placed a note under the door of 60 Brady Street when he was unable to obtain the attention of any one inside by knocking at the door, and that a photostatic copy of the note he left at the building is a part of Exhibit 7.

Emil J. Canepa testified that he is a Deputy United States Marshal; that he has acted as an Italian Interpreter both in and out of court, and that he is qualified to interpret the Genovese, Piemontese and Lucchese dialects; that he examined the third sheet of Exhibit 7

and testified that it was in the Italian language and that he had made a true and correct translation thereof into the English language, which translation was introduced in evidence as U. S. Exhibit 11. This is the document which shows large payments for sugar, rent, etc. including the sum of $300 to "police".

George W. Poultney, representing the bonding company which wrote the bail bond for appellant in the lower court testified as to the bond (U. S. Exhibit 12); that he knew appellant Rocchia, and appellant, through his counsel, conceded that it was his signature on said bond.

Ernest E. Williams, United States Commissioner for this District, testified to the filing of the Commissioner's Complaint with him against appellant under the name of John Caruso, and two others; that a hearing was had before him on January 25, 1933 (Tr. 154) but that no holding or other ruling was made because of the request of counsel for appellant and his co-defendants that they be permitted to file a Motion to Suppress Evidence, and that subsequently, and on January 28, 1933, the then United States Attorney consented to the dismissal of appellant and Cappi, and requested a holding of the defendant Ferrari and that this was done. He testified definitely that he made no ruling on a Motion to Suppress Evidence. This testimony was placed in the record because of requests made by appellant through his counsel and contentions made not borne out by the record.

Professor E. O. Heinrich testified that the signature Joseph Rossi appearing on the lease (Exhibit 13)

was in the handwriting of appellant and testified that the portion of Exhibit 7 showing payments of money for sugar, police, etc. was also in the handwriting of appellant. He likewise testified that the fingerprint on Exhibit 3 and the fingerprints on Exhibit 14 were the prints of one and the same man, Exhibit 3 being identified as the prints of appellant and Exhibit 14 bearing the signature of appellant. Appellant in this connection through his counsel stipulated to the qualifications of Professor Heinrich and particularly stipulated that he was qualified to testify as an expert on handwriting and fingerprints (Tr. 160). The expert further testified, on cross-examination, that each of the exemplars used by him was necessary in reaching his conclusion (Tr. 165-6).

ASSIGNMENT OF ERRORS.

The assignment of errors, covering some sixty-four pages of the transcript (15 to 79 inclusive), is made up of over fifty separate alleged errors. Appellant has reduced them in his argument, in the Brief, to six alleged grounds of error, viz.:

(1) Appellant's constitutional rights as embodied in the Fourth and Fifth Amendments were violated;

(2) Error in admission in evidence of photostatic copies of documents taken from person of appellant at time of arrest;

(3) Error in admission of memorandum left on premises by water inspector;

(4) Error in admission of fingerprint card (Exhibit 14);

(5) Alleged misconduct on the part of both court and the United States Attorney; and

(6) Error in admission of testimony of conversation of government investigators in presence of appellant.

ARGUMENT.

A very careful reading of the more than fifty assignments of error set out in the transcript shows only the following points raised thereby:

1. Violation of rights guaranteed by 4th and 5th Amendments to the Constitution;
2. Violation of *Best Evidence* Rule of evidence in admission in evidence of photostatic copies of documents taken from person of appellant;
3. Alleged misconduct of United States Attorney in agreeing with appellant that original documents were in possession of appellant;
4. Alleged failure of Court to instruct jury on alleged misconduct of United States Attorney;
5. Admission of alleged prejudicial evidence in use of fingerprint card bearing signature Antonio Rocchia.

I.

SEARCH AND SEIZURE.

The first assignment of error urged by appellant, in his Brief, is based upon an alleged violation of his rights as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States, in that he claims that the government officers entered the premises involved, i. e. 60 Brady Street, San Francisco, without sufficient probable cause.

This necessarily raises two questions:

(1) Is appellant a proper person to question that entrance; and

(2) In any event was the officers' entrance to the building justified and warranted by the facts.

These questions were presented to the trial court by motion of appellant to suppress evidence on January 6, 1933 (Tr. 80), and subsequently, following oral argument and the filing of Briefs, the Motion to Suppress Evidence was submitted and denied by the trial court (Tr. 91-2); the order being predicated upon an Amended Motion to Suppress, filed subsequent to the hearing, the government making no objection to the amendment (Tr. 87 to 99 inc.).

Out of an abundance of caution the government before the trial court, in its argument to the court, and in its briefs, while openly contending that appellant is not a proper person to question the legality of the search, likewise presented to the court its argument and authorities in support of the legality of the search in any event.

Is Appellant a proper person to question legality of search of distillery premises.

At the outset it is well to call the court's attention to the Amended Motion to Suppress (Tr. 89), wherein appellant limited his interest to the personal property seized and disclaimed any interest in or to the premises entered.

> "That as a result of the search of said premises (60 Brady Street, San Francisco, California) said officers found certain properties which they seized. That said properties so seized as aforesaid was the property of the defendant Antonio Rocchia and was in the possession of Antonio Rocchia at the time the same was seized, as aforesaid. That as a result of the arrest of said Antonio Rocchia said officers found certain property, papers and effects in the possession of said Antonio Rocchia which they seized. That the entry, search and seizure as aforesaid were and each of them was and is illegal and in violation of the rights of Antonio Rocchia under the Fourth and Fifth Amendments to the Constitution of the United States; that said property so seized as aforesaid was the property of the defendant Antonio Rocchia and was in the possession of Antonio Rocchia at the time of its seizure."

It is to be noted that appellant in his Amended Petition to Suppress Evidence claims no interest whatever in or to the distillery premises described as 60 Brady Street, San Francisco, but rather specifically and particularly limits his interest to the documents found on his person at the time of his

arrest, and the personal property within the distillery building. Bearing in mind that it is the entrance to the building that is complained of, the court's attention is directed to the settled law to the effect that the legality of a search of a building may be raised only by the owner or one in lawful possession of the premises, and that such ownership or possession must be shown in the petition to suppress evidence.

Pong Ying v. U. S., (C. C. A. 3) 66 F. (2d) 67;
Mello v. U. S., (C. C. A. 3) 66 F. (2d) 135;
Bilodeau v. U. S., (C. C. A. 9) 14 F. (2d) 582;
Rouda v. U. S., (C. C. A. 2) 10 F. (2d) 916;
Brooks v. U. S., (C. C. A. 9) 8 F. (2d) 593;
Occinto v. U. S., (C. C. A. 8) 54 F. (2d) 351;
Remus v. U. S., (C. C. A. 6) 291 F. 501, 510;
Schwartz v. U. S., (C. C. A. 5) 294 F. 528.

In the *Mello case*, supra, the appellate court said:

> "It has been consistently held in the various circuits that the guaranty of the Fourth Amendment against unreasonable search and seizure is a personal right or privilege, available only to one who claims ownership or possession of the property which has been subjected to the alleged unreasonable search or seizure. This court so held in Chepo v. United States, 46 F. (2d) 70. The question was determined in the same way by the Second Circuit in Connolly v. Medalie, 58 F. (2d) 629; by the Fifth Circuit in Cantrell v. United States, 15 F. (2d) 953, certiorari denied 273 U. S. 768, 47 S. Ct. 572, 71 L. Ed. 882; by the Sixth

Circuit in Remus v. United States, 291 F. 501; by the Eighth Circuit in O'Fallon v. United States, 15 F. (2d) 740, certiorari denied 274 U. S. 743, 47 S. Ct. 587, 71 L. Ed. 1321; and by the Ninth Circuit in Bilodeau v. United States, 14 F. (2d) 582, certiorari denied 273 U. S. 737, 47 S. Ct. 245, 71 L. Ed. 866.

"Since no constitutional right of the defendants has been invaded, they are not in a position to attack the legality of the search and seizure. With this question disposed of adversely to the contention of the defendants, the record discloses that there was ample evidence to justify the jury in returning the verdicts of guilty."

Authorities cited by appellant in lower court in support of his alleged right to question right of officers to enter distillery building.

In the lower court appellant, in his Reply Brief, sought to bring himself within the rule that only an owner or one in lawful possession could object to the search of premises by claiming that the Fifth Amendment to the Constitution permitted the owner of personalty within a building to complain of the entrance to that building. However he was unable to cite any cases in support of his novel proposition. The cases that he did cite at that time are:

Lewis v. U. S., (C. C. A. 9) 6 F. (2d) 222;
Armstrong v. U. S., (C. C. A. 9) 16 F. (2d) 62.

The cases are not in point because the personal property that was seized in the *Lewis* case and referred to by the court consisted of a brief case and the evidence

obtained therefrom, and had no connection with the entrance and search of any house or building. Of course it was not the seizure of the brief case *per se* that was complained of in the *Lewis* case, but rather the evidence that was secured in the search thereof. The *Armstrong* case involves the entrance to a public garage and the seizure of an illicit distillery therein contained. The court in passing upon the legality of the search of the garage building uses language similar to that in the *Lewis* case, which it cites as authority for its ruling that no rights of Armstrong had been violated. In the *Lewis* case (p. 223) the court used broad language, as follows:

> "Plaintiffs in error, in their petition to suppress, made no claim either to the premises searched or to the property seized, and, in the absence of such a claim, they are in no position to raise the objection that the search was unreasonable or unauthorized or that their constitutional rights were invaded."

Appellant erroneously deduces therefrom that in the matter of entrance to a house or building for the purpose of searching; it is sufficient if he merely claimed in his motion to suppress an interest in the property within the building.

Appellee is satisfied that the order of the District Court denying the petition to suppress evidence was properly and correctly made on the basis of there being no proper party petitioner before it. For the convenience of this court, however, and, without in any degree minimizing the importance and conclusiveness

of that point, appellee presents, in the appendix to this brief, a discussion of the right of the officers to enter the premises under the circumstances here involved (See appendix).

II.

ADMISSION IN EVIDENCE OF CERTAIN DOCUMENTS TAKEN FROM PERSON OF APPELLANT AT TIME OF ARREST.

The second ground urged by appellant, in his Brief in support of his appeal, is that the court erred in admitting photostatic copies of documents taken from his person at the time of his arrest, and alleges that Assignment of Errors 11, 12, 14, 23, 27, 35 and 41 cover this field of his argument.

Generally speaking the Assignments mentioned, individually and collectively, embody the same general questions raised by the other Assignments, that is: the violation of the constitutional rights of appellant as guaranteed by the Fourth and Fifth Amendments; that original documents are the best evidence; and the dismissal of appellant by the United States Commissioner.

The matter of appellant's constitutional rights has heretofore been discussed. The authorities cited by the government amply support the ruling of the trial court, that no rights of appellant were violated by the entrance of the officers into the distillery building. As to the matter of dismissal by the United States Commissioner, it is sufficient to answer that a ruling of

a United States Commissioner, a subordinate of the District Court, is not binding, either upon the United States Attorney or the District Court (*U. S. v. Maresca,* 266 F. 713, 721). While appellant dwells at some length as to what took place before the Commissioner as testified in the trial court, such testimony is immaterial and of no effect in this or in the trial court, and is in the record simply because appellant insists that it be there.

The important point is, however, that the trial court heard the evidence, both on the hearing of appellant's Motion to Suppress, and at the trial itself, and in each instance found that no rights of appellant had been violated by any act of the government officers. See Order of his Honor Judge Louderback entered February 3, 1934 (Tr. 91-2).

As said by the appellate court in *Occinto v. U. S.,* supra:

> "The question of the legality of the search and seizure was a matter relating to the admission of evidence which is purely for the court and in this case was determined by the court before the trial. Steele v. U. S., 267 U. S. 505, 511."

Much importance is likewise attached by appellant to an Order, entered by his Honor the late Judge Kerrigan, and made long prior to the return of the indictment in this case, directing the return of documentary evidence taken from the person of the defendant. From this Order, which appears in toto at page 113 of the transcript, it is apparent that it was made by the trial

court only after the consent and approval of the then United States Attorney was endorsed upon the face of the proposed Order at the time of submission to the court. There is nothing in the record to show why the then Assistant United States Attorney approved the order, as represented by the initials S. A. A. appearing after I. M. Peckham, United States Attorney, under the designation "approved". No evidence was presented to explain this approval or to explain why the order recited that a motion to suppress evidence had been granted by the United States Commissioner. Apparently, however, the court can assume that as regards appellant the then Assistant United States Attorney believed that no sufficient case was presented to him. The Order of Judge Kerrigan, dated January 30, 1933, was entered exactly two days after Commissioner Williams, according to his testimony and records, had held defendant Ferrari and dismissed the other defendants, to-wit, Cappi and appellant, then known as John Caruso. The Commissioner, in his testimony (Tr. 153), said:

> "My records show that the disposition of the case was by me; on January 28, 1933 I held the defendant Ferrari and I dismissed the other defendants, to-wit, Cappi and Caruso. I have in my docket that Mr. Abrams, who represented the government at that time, consented to the dismissal of Caruso and Cappi. * * * I follow the policy of the United States Attorney, that is, if he suggests a dismissal I accept the suggestion. I would say there was no ruling by me on any Motion to Suppress so far as the defendant Caruso is concerned."

While appellant is the only defendant before the court at this time, the indictment in the case shows that those arrested at the distillery premises, that is Ferrari, Cappi and appellant, are named in the indictment returned by the Grand Jury. This indicates, of course, that the Grand Jury, when the case was presented to it, disagreed with the then United States Attorney that appellant and Cappi should be dismissed and Ferrari alone indicted. Instead, very properly, it indicted all defendants.

The case of *Silverthorne Lumber Co. v. U. S.,* 251 U. S. 385, is cited by appellant and quoted from, to some extent on pages 35, 36 and 37 of his Brief. He prefaces the quotation by the following unwarranted statement:

> "Where the search and seizure was held unreasonable and papers taken in connection with such search were ordered returned, it was error to use photostatic copies thereof in evidence upon the trial."

There is nothing in the facts of the *Silverthorne* case to warrant its citation by appellant in the case at bar. Likewise, there is nothing in this case to warrant the statement just quoted from the brief of appellant. The only Motion to Suppress heard on behalf of appellant in either the District Court or the Commissioner's Court was decided adversely to appellant and not in his favor, as the statement quoted above would seem to indicate.

Appellant then goes on to cite *Gouled v. U. S.*, 255 U. S. 298, as authority to the effect that to permit the use in evidence of documents taken from the person of appellant when the search and seizure is held unreasonable is equivalent to compelling the defendant to be a witness against himself. This case deserves but the same comment made by us in referring to the *Silverthorne* case, supra. Furthermore, it is difficult to understand appellant when he insists that the trial court held the search and seizure as to appellant to have been unlawful and unreasonable, when in fact the record is that the court's order is directly to the contrary.

Appellant, in his brief, then cites numerous cases to the effect that the order of Judge Kerrigan is binding on the trial court. It is not necessary to discuss any of those cases, because the most the order does is to direct the return of the documents. All of them apparently were returned and are presumably still in the possession of appellant. In any event no attempt has been made to have that order set aside. Consequently appellant's objection in this regard falls of its own weight and the trial court properly permitted the introduction of photographic copies of these documents in evidence.

III.

ADMISSION OF VON HUSEN MEMORANDUM.

The third ground of appeal, as made in the Brief of appellant (not covered by any Assignment of Error or objection made at the trial) is that it was error to

admit in evidence the Von Husen memorandum found on the person of appellant after his arrest (page 7 of Exhibit 8), for the reason that it was not shown that appellant had ever answered or acted upon the note, which read as follows:

> "I have shut off your water at valve in meter box. Meter running wide open. Pipe must be broken inside as water bill for month of Dec. will be over $75.00. Would advise getting plumber and calling at office, 425 Mason Street.
>
> Von Husen, Inspector
> S. F. Water Dept.
> 1/4/33 1:30 P. M."

Appellant cites *Poy Coon Tom v. U. S.*, 7 F. (2d) 109, as authority for his contention that this memorandum or note was inadmissible.

Of course the document in question was not a letter requiring an answer, and does not come within the rule laid down by this court in the *Poy Coon Tom* case.

In this connection, it should be borne in mind that appellant, at the time of his arrest, claimed to have been an innocent victim of circumstances:

> "He (appellant) stated that he did not know anything about the distillery; that he had been given the key by someone down there on Third Street who had told him that if he went to 60 Brady Street and entered this building he might find something in the way of work— * * * that he did not know the party who gave him the key." (Tr. 127-128; Witness De Kalb).

The witnesses Burt and Goggin testified to the same effect, Investigator Burt adds, however:

> "At that point he (appellant) refused to answer any further questions." (Tr. 146)

The document is admissible, therefore, if for no other reason, as bearing on the purpose of appellant's visit to the premises on the night in question and his connection therewith.

While appellee, for the convenience of the court, has discussed this phase of appellant's Brief on the merits, it nevertheless calls the court's attention to the fact that there is no Assignment of Error covering this particular point; furthermore no objection was made at the trial to the admission of this evidence other than the general objection, made to the introduction of all evidence, that it violated appellant's constitutional rights as alleged under the Fourth and Fifth Amendments, and that its admission was a violation of the best evidence rule. The only objection that might have had merit, if interposed on the trial, was the objection that the note was neither answered nor acted upon. This objection not having been made before the lower court, the right to predicate error on the admission of the evidence was waived, and appellant may not now, for the first time, urge error.

Phoenix Securities Co. v. Dittmar, (C. C. A. 9) 224 F. 892, 895;

Wight v. Washoe County Bank, (C. C. A. 9) 251 F. 819;

Louie Share Gan v. White, (C. C. A. 9) 258 F. 798.

IV.

USE OF ROCCHIA FINGERPRINT CARD AS EXEMPLAR OF SIGNATURE OF APPELLANT.

Appellant, in his Brief under the heading "Fourth Ground for Reversal", claims error because the court permitted the introduction in evidence of a fingerprint card dated October 1, 1930, and bearing the signature of appellant (U. S. Exhibit 14).

Appellant at the time of his arrest gave his name as John Caruso and on the fingerprint card made at the time of his arrest, signed his name John Caruso (U. S. Exhibit 3).

It was incumbent upon the government to prove not only that appellant was arrested in the distillery on January 9, 1933, and that his statement then made that he entered the premises seeking work, was false and was made for the evident purpose of misleading the officers, but also that the very significant documents found in his possession (U. S. Exhibits 7 and 8) belonged to him and were in his handwriting. These documents included a driver's license, receipts for foreign money orders, automobile insurance identification card, certificates of bank deposits in the name of Antonio Rocchia, as well as memorandums showing purchases of sugar, cans, yeast and notations of cash receipts or payments including the sum of $300 to "Police". That some of these latter type documents were in the handwriting of appellant, is evidence not only that appellant lied to the officers when he was arrested, but also that he was vitally concerned with the operation of this distillery. It should also be borne

in mind in this connection that the Von Husen note which was found on the person of appellant and which stated that the water meter was running wide open and that the inspector for the water company had closed the water valve in order to prevent great loss of water and the incidental expense thereof, was left on the premises on January 4, 1933, five days previous to its being found on the person of appellant. This was proper evidence from which the jury could find that appellant had visited the premises in question on a previous occasion, or else that whoever did visit the premises had found the note and turned it over to appellant as the one who was most interested in it.

Professor Heinrich, an examiner of suspected and disputed writings, engaged in the practice of a consulting criminologist in the field of chemistry and physics, and admitted (Tr. 160) by appellant to be a qualified *expert* on handwriting and fingerprints, was called as a witness by appellee. He testified to having examined Exhibit 3, being the fingerprint card dated January 9, 1933, Exhibit 14, being the fingerprint card signed "Antonio Rocchia" and dated October 11, 1930; Exhibit 12, being the bail bond of appellant as given in the trial court; Exhibit 13, being the Thulin lease; and, portions of Exhibit 7; that he examined the handwriting on each of these cards and further testified that the signatures on the fingerprint cards, the lease and the bond were made by one and the same person. This witness likewise testified that the fingrprints on Exhibits 3 and 14 were the prints of the same man. In other words, he testified that

the card bearing the signature, Antonio Rocchia, contained the fingerprints of appellant and that they correspond with the admitted fingerprints of appellant on the card signed John Caruso. In this connection the witness testified under cross examination (Tr. 164-5-6-7):

> "The Court: As I understand it, you were not interested in alone in taking a signature that somebody told you was Rocchia's but you compared all these writings to establish in your mind that the same individual, whoever he might be, actually wrote these various writings?
>
> A. That is the way the problem was handled. That was the real problem so far as I was concerned. I don't know Mr. Rocchia. I never saw him write. Consequently it is by other testimony that someone must establish that some of those signatures are his signatures. The foundation of the examination was a signature. I did not have any other writings as the foundation or basis for my expert opinion. It was only told to me that that might be Rocchia's handwriting on Government's Exhibit 7 in evidence. When they submitted all these documents they were variously described. U. S. Exhibit No. 7 was described as an exemplar with a reservation that it had not been fully identified; that is the way it was presented to me. I included it in one of my exemplars with that reservation until after I had established my basis on the comparison of signatures, and thereafter I considered it with relation to the signature.

Q. In other words, you could take any one of those writings as an exemplar and by comparing it with the other writings you would be of the opinion that all the writings were by the same person; is not that correct, or have you a doubt as to any of those writings?

A. No, I have no doubt as to any of the writings but if the exemplars are withdrawn one by one until I am reduced to just the bond, which is Exhibit No. 12 (in evidence), and the lease, which is Exhibit No. 13 (in evidence), I would have to qualify my answer somewhat, but having before me Government's Exhibit 7 for identification (U. S. Exhibit No. 14 in evidence) bearing the signature Antonio Rocchia and the bond (U. S. Exhibit No. 12 in evidence) bearing the signature Antonio Rocchia, and Government's Exhibit No. 3 (in evidence) bearing the signature John Caruso, there is enough material in those four signatures to positively establish the identification, and from that to proceed to any other writing by the same person.

Mr. Perry. Q. Taking Government's Exhibit No. 13 in evidence, what are the dissimilar features to all the exemplars, taking each word?

A. When you include the exemplars as a group the dissimilarities are reduced practically to zero. If you select, for instance, that which seems to be farthest away, the bond, Government's Exhibit No. 13, and the signature Joseph Rossi on Government Exhibit 12, then we are comparing writing which differs in size and differs in the presence of certain letters. Joseph Rossi and Antonio Rocchia have in common only the letter

'o' and the letter 'i'. In the case of Government's Exhibit No. 12 the erroneous writing of 'c' following 'o' in the name Rossi—it is written 'R-o-c', and a correction appearing therein correcting it and concluding it as Rossi. The name as it was written was begun, 'R-o-c', exactly as it is in Rocchia. Those are the similar features. As to the dissimilar features the presence in the name Joseph Rossi, the 'J', the small letter 's' and the small letter 'e'. The small letter 'h' occurs in Joseph and in Rocchia as a common feature. I have enumerated them in so far as these letters occur which are common to the two names. They are not dissimilar in their construction or their formation, their slope or their style; they are dissimilar only in size. They retain, in spite of the difference in size, the same proportion and the same procedure in their production. The dissimilarities, if we may call them dissimilarities, are only those dissimilarities which involve the presence of other letters—letters which are not common to the two names."

Thus it can be readily seen that Exhibit 14 was valuable and necessary to the handwriting and finger-print expert in reaching his conclusion that the disputed documents found on the person of appellant and the lease for the distillery building itself were in the handwriting or contained the signature of appellant. Needless to say that was the only purpose for which the document was introduced in evidence. Moreover it was the only document signed by appellant prior to his arrest, which the government could

definitely prove was the signature of appellant, the other documents bearing different signatures, as for instance John Caruso, Joseph Rossi, etc.

Furthermore the expert witness on cross examination testified very definitely that he would have to qualify his answer if he were not permitted to use Exhibit 14:

> "In other words, you could take any one of those writings as an exemplar and by comparing it with the other writings you would be of the opinion that all the writings were by the same person; is not that correct, or have you a doubt as to any of those writings?
>
> A. No, I have no doubt as to any of the writings but if the exemplars are withdrawn one by one until I am reduced to just the bond, which is Exhibit No. 12, and the lease, which is Exhibit 13, I would have to qualify my answer somewhat, but having before me Government's Exhibit No. 14, bearing the signature Antonio Rocchia and the bond, Exhibit No. 12, bearing the signature Antonio Rocchia, and Government's Exhibit No. 3 bearing signature John Caruso, there is enough material in those four signatures to positively establish the identification, and from that to proceed to any other writing by the same person."

Authorities.

Certain cases have been cited by appellant to the effect that it is frequently prejudicial error to introduce in evidence proof of previous arrests or pre-

vious charges of a similar nature for the purpose of proving the guilt of defendant to the charge at issue. Of course the government has no quarrel with such cases or with the rule reiterated by them. However the case of *People v. Van Cleave,* 208 Cal. 295, cited by appellant as "a similar case to the case at bar" involves, as set forth in appellant's brief, the admission in evidence of a fingerprint card. The purpose of the admission of the fingerprint card in the *Van Cleave* case, however, contrary to the purpose in this case, was simply to prejudice the jury against accused. It is therefore obviously not in point. In the *Van Cleave* case no reason or purpose was advanced to support the introduction of the fingerprint card in evidence, and the court very properly found that its only purpose was to prejudice the jury. The court there said (Appellant's Brief p. 65):

> "The Exhibit was offered merely because it was inspected by the fingerprint expert during the investigation which preceded appellant's arrest."

The *Van Cleave* case is the only case cited by appellant in which the introduction into evidence of a fingerprint card showing a prior arrest is discussed. The case is not in point however for the reason just given, and although the California Supreme Court in that case did order a reversal of the judgment because of the admission of the fingerprint card, coupled with misconduct on the part of the trial judge, it is important to note that Chief Justice

Waste and Justice Richards of that court dissented from the majority opinion and said:

> "The majority opinion admits, without qualification, that 'there was sufficient evidence to support the verdict'. The further analysis of the evidence made 'in order to determine whether there has probably been a miscarriage of justice', does not, in my opinion, establish that the case was 'a close one'. The evidence in the case, aside from, and unaffected by, any errors of the trial court, being sufficient to support the conviction, no miscarriage of justice resulted."

The rule of the federal courts is to the same effect. Section 269 of the Judicial Code (28 U. S. C. 391), in part, reads:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the party."

The *Van Cleave* case, supra, as heretofore stated, is the only case cited by appellant in which the use of a fingerprint card at the trial is discussed. Being unlike the present case, in which the fingerprint card was used as an exemplar, it has no bearing, or relevancy on the instant case.

The other cases cited by appellant in support of his contention in this regard are not in point and need

not be here discussed. The quotations therefrom, appearing in appellant's brief, amply indicate appellee's contention that they do not apply.

Prejudicial evidence not necessarily inadmissible.

Moreover, as the Supreme Court of California once said:

> "It is true that in trying a person charged with one offense it is ordinarily inadmissible to offer proof of another and distinct offense, but this is only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged. But whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the mind of the jurors is no ground for its exclusion."
>
> *People v. Walters,* 98 Cal. 138, 141.

The government, having established that Exhibit 14 was signed by appellant, it was entitled to the use of the document to prove that appellant was the lessor of the distillery building. Furthermore it was the only document in the possession of the government susceptible of proof of its having been signed by appellant prior to his arrest and at a time when he would have had no purpose in possibly disguising his handwriting. The fact that the exemplar, Exhibit 14, contained a record of a prior arrest of appellant does not deprive the government of the right to use

the document as an exemplar, *People v. Walters,* supra.

In his closing remarks in this regard appellant says (Br. p. 64):

> "In view of prior record on said fingerprint card the jury in arriving at its verdict must have been influenced thereby. It is apparent that the defendant was prejudiced by such evidence."

That such is not the case is apparent when we consider that the jury after very carefully weighing the evidence failed to convict appellant on the charge of conspiracy.

Moreover, if appellant had desired so to do he could have requested an instruction that the exhibit in question was only to be considered by the jury as an exemplar.

V.

ALLEGED MISCONDUCT OF COURT AND OF THE UNITED STATES ATTORNEY.

The fifth alleged ground for reversal, as contained in appellant's Brief, is misconduct on the part of his Honor, Judge Louderback, and on the part of the Assistant United States Attorney trying the case on behalf of the government. This contention is, perhaps, the best illustration of the extent to which appellant has gone in his attempt to defeat the ends of justice.

The court will readily see from the record (Tr. 115-122) that when the government sought to introduce secondary evidence, that is, photostatic copies of the documents taken from the person of appellant and returned pursuant to the order of January 30, 1933 (Tr. 113), appellant, through his counsel, made strenuous objection to the receipt thereof, in evidence, on various grounds, including violation of the constitutional rights of appellant; that the case as to appellant was dismissed before the United States Commissioner; and, that photostatic copies were not the best evidence. In connection with the latter ground counsel for appellant said:

> "Mr. Perry: I wish to make the further objection since your Honor has not ruled at this time, upon the ground that the documents, themselves, that they took from the defendant, Rocchia, are the best evidence."

Thereupon the following colloquy between court and counsel took place:

> "Mr. Goulden: There is no question about that, your Honor, if the defendant desires to produce them we will use them.
>
> Mr. Perry: I object to that as an improper remark by counsel.
>
> The Court: I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce for instance. *Of course, if it is something that could*

> *not properly be before the court that is another situation.* So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest and a defendant under arrest can be searched if properly arrested." (Tr. 120).

Then followed testimony covering the results of the search of the person of appellant, after his arrest, and the introduction in evidence of photostatic copies thereof (Exhibits 7 and 8). After describing the documents, witness De Kalb, testified:

> "Investigator Burt had these papers in his possession. He retained them. I have seen an order in the files, an order of the court, ordering the return of certain papers, but I did not see them returned; they are not in the office at the present time. I found in the office duplicates or photographs—purporting to be photographs of the papers. I examined these photographs; they are true representations of the papers given to me by Mr. Burt and said to have been taken by him from the defendant Rocchia." (Tr. 124).

Thereupon appellant, through his counsel, made strenuous objection on the same grounds heretofore mentioned.

The court, in passing on the objection, said:

> "Any documents, if there were such documents, cannot be gotten at this time.
>
> Mr. Goulden: The government has made no demand, your Honor.

> The Court: I think the only thing that can be done is to have the witness testify whether this appears to be a copy of the true document taken from the defendant at that time.
>
> A. All with the exception of these three checks which do not represent anything that were on the person of the defendant, were shown to me by investigator Burt." (Tr. 126).

And, the court added:

> "Of course you are right that we cannot get anything from the defendant. You are absolutely correct on that. It would be testifying against himself. There is no doubt but that these photographs can be taken into consideration if they are true photographs of the documents that were upon the person of the defendant at the time which has been testified to." (Tr. 126-7).

It would seem therefore that the record itself as found in the transcript is the best answer to the contention of appellant in this regard. It there appears very definitely that defendant was not called upon to testify against himself or to produce evidence in his possession.

It is not necessary to review the decisions cited by appellant, holding that in a criminal case the defendant cannot be called upon to testify against himself.

Before the matter is passed, however, it may be proper for the government to suggest that appellant, in his brief, has shown an unfortunate tendency to unjustly criticize the trial court and to misquote the rec-

ord. For instance at page 77, and also at page 79 of his brief, the statement is made that the court refused to instruct the jury that the government could not make demand upon the defendant to produce evidence, yet the record shows that the court, in that regard and during the trial, said:

> "Of course you are right that we cannot get anything from the defendant. You are absolutely correct on that. It would be testifying against himself." (Tr. 126).

Furthermore in the court's instructions to the jury at the conclusion of the trial, the court said:

> "I might state that in the production of evidence here I think it is possible, although I have not reviewed the record, that the court indicated that it was incumbent upon the defendant to produce certain documents which had been returned to him, if application was made by the government for their production. That is the civil law but not the criminal law. If I did so state in the record I erred. I want you to understand that the defendant is not compelled to produce anything against himself, even if demand is made upon him in a criminal action. In your consideration bear that in mind, that the defendant is not required or expected, nor can you assume anything against him because he has not produced, if he has them —there is nothing to establish that he has them at the present time—any documents which might have been desired by the government to be produced, if they did so desire to have them produced." (Tr. pp. 180-181)

It is obvious, from the foregoing, that no reversible error was committed either by the trial court or by the United States Attorney. Further, that the court, during the trial and while instructing the jury, carefully advised the jury that appellant was under no obligation to produce any evidence against himself.

VI.

ALLEGED ERROR OF COURT IN ADMISSION IN EVIDENCE OF STATEMENTS MADE BY GOVERNMENT OFFICERS IN PRESENCE OF APPELLANT.

Appellant, in his brief, complains of the admission in evidence of oral conversations between the government witnesses in the presence of appellant on the evening of January 9, 1933, in the distillery building. He claims that such evidence violates the rules of evidence in regard to admissions. However, no assignment of error has been made in this regard nor was any such objection made at the trial to the introduction of this testimony by appellant. This being so, there is nothing before the court for review.

However, assuming that the question was properly raised, the court's attention is directed to the general rule, as stated by appellant on page 85 of his brief, quoting *Wharton's Criminal Evidence,* 10th Ed., Vol. II, Section 679, wherein such testimony is held to be admissible. Appellant then attempts to place the testimony complained of within an exception to the rule; that is within the rule holding that to be admissible

the statements must be of a character that would naturally call for action or reply on the part of appellant and relate to the offense charged. It will be remembered that the statements in question were made at the time of the arrest, and, as said by appellant, in his brief (p. 85), in front of appellant and while looking down at him, and not at some subsequent hearing as was the case in *McCarthy v. U. S.*, 25 F. (2d) 298, cited by appellant. However, in any event, the rule is that it is a matter within the discretion of the trial court. For authority for this statement we need only go to the case of *Di Carlo v. U. S.*, (C. C. A. 2) 6 F. (2d) 365, cited by appellant. There is no question here but that appellant heard and understood the statements complained of and, while it may be that he was under no duty to make answer thereto, his silence is a circumstance to be submitted to the jury. As was well stated by his Honor Judge Louderback at the trial:

> "It is a question whether a man has a question directed to him or when things are said that apply to him, it is of moment to know how a man acts or what he says in response thereto. In this case these statements were made in his presence and he did not elect to reply. I will allow it to remain in the record." (Tr. 133).

VII.

HARMLESS ERROR.

Assuming for the purpose of illustration only that error was committeed in the trial of this case, it is

such as would come within Section 269 of the Judicial Code heretofore cited, and did not affect the substantial right of appellant.

It will be recalled that appellee proved, at the trial, not only that appellant was arrested in the distillery building and that he owned the distillery, the 1000 gallons and more of whiskey and alcohol, the many thousands of gallons of mash, etc., but also that he was active in the management of the illicit enterprise; that he signed the lease for the distillery building under the assumed name of Joseph Rossi and that he also gave a false name at the time of arrest and attempted to bribe the government officer, by offering to pay some $1600 in his possession at the time of his arrest, and offering to make regular payments in the future. All of this evidence was competent and properly admitted and was sufficient upon which to base the judgment of conviction. Furthermore, appellant admits that the government amply proved that it was his hand that signed the Thulin lease, but contends that this proof is nullified because Exhibit 14 was used by the expert. And this in the face of the testimony of the expert that Exhibit 14 was a necessary exemplar to enable him to give an opinion in the matter of the handwriting of appellant.

Where evidence of guilt of a defendant is conclusive, error committed during trial is not reversible.

Taylor v. U. S., (C. C. A. 8) 19 F. (2d) 813;
Garcia v. U. S., (C. C. A. Porto Rico) 10 F. (2d) 355;

Smith v. U. S., (C. C. A. 8) 267 F. 665; rehearing denied 269 F. 365; certiorari denied 256 U. S. 690.

In the case of *Marron v. U. S.*, 18 F. (2d) 218, 219, affirmed 275 U. S. 192, this court had occasion to say:

> "Where there is ample evidence to establish the guilt of a defendant and sustain a verdict, courts are not ready to indulge in finely drawn speculations to sustain a claim of prejudice, made where rulings like the one here considered are called into question."

See also *Williams v. U. S.*, (C. C. A. 10) 265 F. 625.

In *Bain v. U. S.*, (C. C. A. 6) 262 F. 664, certiorari denied, 252 U. S. 586, involving a prosecution for defrauding a national bank, it was held that error in demanding that accused produce certain checks and drafts for use against him does not require reversal, where the court directed the jury to disregard the demand.

Likewise in *Thompson v. U. S.*, (C. C. A. 7) 10 F. (2d) 781, certiorari denied 270 U. S. 654, it was held that the trial court's suggestion that the defense be called upon to produce an original copy of a telegram was not ground for reversal where the court later stated that defendant did not have to produce anything.

Another interesting case in this connection is *Carpenter v. U. S.*, (C. C. A. 4) 280 F. 598, in which it was held that in a prosecution for possessing and con-

cealing liquor in violation of the National Prohibition Act, admission of evidence of other sales, prior to the taking effect of the Act, and not shown to have been connected with those charged, while error, was not ground for reversal in view of the evidence which clearly warranted conviction, and that such error was therefore without prejudice.

In conclusion, and in the language of this court in *Marron v. U. S.*, supra:

> "'In reviewing a judgment in an appellate court, the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial', citing *Rich v. U. S.* (C. C. A. 8), 271 F. 566, *Trope v. U. S.* (C. C. A. 8), 276 F. 348, *Haywood v. U. S.* (C. C. A. 7), 268 F. 795."

Appellant it is respectfully submitted has not successfully sustained this burden.

SUMMARY AND CONCLUSION.

In conclusion, and summarizing the case as presented by this appeal, appellant has failed to establish any of his alleged grounds for reversal, i. e.:

(1) Illegal search and seizure of his premises and violation of his constitutional rights under the Fourth and Fifth Amendments;

(2) Error of court in admission of photostatic copies of papers taken from person of appellant;

(3) Error of court in admission of note of Von Husen, Inspector of San Francisco Water Company;

(4) Error of court in admission of fingerprint card bearing signature of Antonio Rocchia;

(5) Error of court in alleged refusal to instruct jury in the matter of alleged misconduct of United States Attorney; and

(6) Error of court in admission of oral statements made by government officers in presence of appellant at time and place of his arrest.

Answering the first ground, the government has pointed out that appellant having failed to allege in his Amended Motion to Suppress Evidence any right of possession or ownership to the premises at 60 Brady Street, the court had no alternative but to deny his Motion. Also that, in any event, assuming appellant to be a proper party to question the legality of the search, the search was in fact legal and for that reason also the Motion could properly have been denied by the trial court.

As to the second ground of error alleged by appellant, i. e., secondary evidence, suffice it to say that the record (Tr. 113) shows that the original documents taken from the person of appellant were ordered returned to him, and that therefore the government was entitled to introduce photostatic copies of said documents.

The third ground raised by appellant, in his brief, is the admission in evidence of the note made by Inspector Von Husen of the San Francisco Water Department on January 4, 1933, and found on the person of appellant five days later at the time of his arrest. It is not subject to review because it is not embodied in any assignment of error and no objection thereto was made at the trial. This evidence is clearly admissible, however, in the discretion of the trial court, if for no other reason than to show that appellant had not innocently and unintentionally entered the distillery building, and that he had either been there prior to the date of his arrest and personally found the note as placed by Inspector Von Husen, or that others turned it over to appellant as being the party to whom it should go.

The fourth ground complains of the admission of the fingerprint card signed Antonio Rocchia. This, as heretofore pointed out, was admissible, in the discretion of the court, for the purpose for which it was introduced, namely as an exemplar to prove the handwriting of appellant. And the fact that it may have contained data not to the best interest of appellant does not make it inadmissible, bearing in mind that appellant's objection to the document was not that it was not a proper document as an exemplar but rather that it was improper because it contained more than was necessary to be used as an exemplar. Nor does it become inadmissible because appellant's handwriting might have been, in appellant's opinion, proven by other evidence.

The fifth ground relates to alleged misconduct of the United States Attorney and alleged refusal of the court to instruct the jury. As heretofore pointed out, there was in fact no misconduct on the part of the United States Attorney, and no refusal or failure on the part of the court to properly instruct the jury. Defendant was not called upon by the government or the court to produce anything. The most that can be said is that the government fully admitted that the original documents were in possession of appellant, and, while there was nothing in this regard for the court to instruct the jury, the court nevertheless, and contrary to the misstatements appearing throughout appellant's brief, did instruct the jury not only at the time requested by appellant, but also in the instructions to the jury at the conclusion of the trial, to the effect that appellant as a defendant in a criminal case could not be called upon by the government to produce any document or testify in any manner against himself.

The sixth ground, set out in the brief of appellant, complains of the admission in evidence of the oral statements made by the government officers in the presence of appellant at the time and place of his arrest. That these statements were admissible in the court's discretion for whatever the jury determined to give them cannot be questioned. Suffice it to say, however, that no case has been cited by appellant in support of his objection, and furthermore that no objection was made to the introduction of the evidence save and except his stock objection that it violates the Fourth and

Fifth Amendments to the Constitution of the United States.

Furthermore the government has shown that appellant has utterly failed to show any abuse of discretion or error committed by the trial court in the conduct of the trial; and has failed to show, from the record as a whole, the denial of any substantial right of appellant.

Likewise, none of appellant's authorities go any further than to state general principles of law having no application to any of the assignments here raised, while appellee it is respectfully submitted has cited authorities sustaining its position that no reversible error appears in the record and that appellant was accorded a fair and impartial trial.

It is respectfully submitted, therefore, that the verdict of the jury and the judgment of the trial court are correct and proper, and that the judgment should be affirmed.

H. H. McPike,
United States Attorney,

Thos. G. Goulden,
Assistant United States Attorney,
Attorneys for Appellee.

(APPENDIX FOLLOWS.)

Appendix

LEGALITY OF OFFICERS' ENTRANCE TO PREMISES AT 60 BRADY STREET.

Briefly the facts are as follows: Three government officers testified in substance that on January 9, 1933, acting on reliable information that a distillery was being unlawfully operated in the premises at 60 Brady Street, San Francisco, they visited said premises a warehouse type building, and obtained a strong odor of fermenting mash, in the vicinity of the premises, which odor became stronger as the building was approached. That they also observed the odor of distillation and the sounds of a boiler, motor and burner within the building; that the odors of fermenting mash and distillation, and the sounds of the motor, burner and boiler, coupled with the prior experiences of the officers in investigating and seizing illicit distilleries while in operation, definitely indicated to them that a still was being operated on the premises; that they also observed that the building did not display the usual sign required of a lawful distillery (R. S. 3279; 26 U. S. C. 303); that from the sounds emanating from within the building and the odor of distillation, in the light of their experiences in this type of law violation, they knew that the distillery was in operation and being in operation was attended by one or more persons. Before entering the building for the purpose of arresting the operator or operators

and seizing the distillery, they made a careful observation of the building. They noted that it was approximately 50 feet wide and 100 feet deep and constructed of concrete; that it carried a sign indicating that a drayage business was conducted therefrom; that from the first street intersecting Brady Street the officers were in a way alongside of the building and to the rear of it; and that through the glass portion of the large door in the front of the building which was partially open, they observed that the interior of the building was divided by partitions.

> "We could see in about twenty or twenty-five feet back from the front what appeared to be a newly erected partition and through a small aperture at the top of that partition I saw a light coming through and I saw what appeared to be the top of a large door that had been cut in the partition but was concealed all but about 6 inches by a large pile of pasteboard cartons. There were truck tracks running back along that pile of cartons apparently through that doorway." (Tr. 81-2)

The officers further testified that the building presented, to one facing it on Brady Street, a small door on the extreme right and a large door in the center, that the large door was of the sliding type; that it was not locked and not fully closed; that the officers slid back this door, entered the premises, went through two partitions and discovered a large distillery in full operation and arrested the operator, Ferrari.

In this connection the government points out, in the matter of a search without a warrant, that

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."
>
> *Go-Bart Importing Co. v. U. S.,* 282 U. S. 344;
> *Garske v. U. S.,* 1 F. (2d) 620, 625;
> *Lambert v. U. S.,* 282 F. 413;

and again, that

> "To throw a shield of constitutional protection over a lawbreaker who has himself created the evidence on the outside of his premises that the law is being violated within such premises is to make the constitutional provision not a means of protecting against unwarranted entrance but a barrier to lawful entrance by a vigilant officer where evidence of law breaking comes from the premises thus sought to be shielded from all efforts to enforce the law."
>
> *Pong Ying v. U. S.,* (C. C. A. 3) supra.

> "A crime is committed in the presence of an officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect, that such is the case. It is not necessary, therefore, that the officer should be an eye and ear witness to every fact and circumstance involved in the charge or necessary to the commission of the crime.

"The provision against unreasonable searches and seizures, being directed to prevent general exploratory writs and investigations of the homes of persons and the property of the citizen, has no application to and does not prevent the arrest in accordance with the course of common law, and of the statutes directing the same without a warrant, and wherever a felony has been committed, either in the presence of the officer or as to which the officer has a belief induced by reasonable grounds, or a misdemeanor has been committed in the presence of the officer, that is, of which the officer has evidence by his senses sufficient to induce a belief in him based upon reasonable grounds of belief, an arrest may be made without a warrant, and the instruments and evidence of crime seized."

U. S. v. Rembert, 284 F. 996.

"Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty."

2 *R. C. L.,* 451.

In this connection the court said in *U. S. v. Rembert,* supra:

"Now it appears from these decisions that it is not essential, in making an arrest without warrant, the officer must absolutely know that an offense is being committed; he must believe that it is being committed, and must believe upon the evidence of his own senses in the case of a mis-

> demeanor, and in the case of a felony upon credible evidence of other persons."

A case very much in point is *McBride v. U. S.*, 284 F. 416. There federal officers went on the premises of the defendant without a search warrant, and without knowledge of the presence of any person, after having smelled fumes of whiskey then being made, and knew therefrom that a still was in actual operation. They saw no signs of any person and proceeded to the stable where the fumes led them, and entering saw a light in the cellar below and the steam of whiskey being manufactured, coming out. In the cellar a still was found in operation and the operators were taken into custody. A petition to suppress was made and denied. On appeal the appellate court, in its opinion, said:

> "The entry on these premises and into the stable was not to search for evidence but upon ascertaining that whiskey was in process of manufacture thereon, to arrest those in the commission of an offense then in progress. If an entry can be made without warrant in cases where the officers acquired information evidencing the present commission of a crime, then the use of knowledge acquired by lawful entry is not the use of knowledge illegally acquired.
>
> "Where an officer is apprised by way of his senses that a crime is being committed, it is being committed in his presence so as to justify an arrest without warrant."

And in the very recent case of *Mello v. U. S.*, supra, wherein the facts, if not identical, closely parallel the facts in the instant case, the court said:

> "The prosecution was based upon testimony of prohibition agents and investigators that they detected the odor of fermenting mash emanating from the premises in which the defendants were later arrested, and that they heard the sound of machinery and the hiss of steam. They thereupon entered the premises without a search warrant and found a still in operation, 2000 gallons of alcohol, and 45,000 gallons of mash in the process of fermentation."

The officer there testified:

> "I did not hear anybody, but I heard the machinery running and the hissing of steam, and I took it for granted someone was there attending to the machinery."

The controlling authority in this circuit is *Donahue v. U. S.*, 56 F. (2d) 94. The instant case differs therefrom in that a dwelling is not involved. Our appellate court there said:

> "The illegal manufacture of liquor is a felony. * * * If the information which had reached the officers prior to the arrest and search, that is, prior to the opening of the door of the dwelling house, and the knowledge they had gained through their senses of smell and hearing, was sufficient to give them probable cause to believe that a felony was being committed in their presence, they were entitled to enter the dwelling and make the arrest. (Citing cases).
>
> * * * * * * *
>
> "It is familiar law that it is presumed that one intends to do that which he in fact does do.

> Therefore it is clear that the officers intended to make an arrest, and it is difficult to escape the conclusion that, before they entered the premises, they had formed the intent to arrest the individuals found operating the still."

No contention is made that the sense of sight is better than the combined senses of smell and hearing, as a basis for probable cause to believe a violation of the law is taking place.

> "Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight."
>
> *U. S. v. Borkowski,* 268 U. S. 408, 412.

Under all the circumstances of this case there existed ample probable cause for the officers to conclude not only that contraband property was unlawfully in the building, but also that a crime was in the actual commission therein, giving the officers the right of immediate entry for arrest and seizure. This is true in the case of illicit stills irrespective of whether or not any one is found in actual operation of the still or not.

As to whether the officers had knowledge that a still was unlawfully in operation on the premises, it is sufficient to point out that Revised Statute 3279 (26 U. S. C. 303) provides:

> "That every person engaged in distilling or rectifying spirits * * * shall place and keep conspicuously on the outside of the place of such

> business a sign exhibiting in plain and legible letters not less than three inches in length * * * the name or firm of the distiller, * * * with the words 'registered distillery' * * *."

Furthermore, Revised Statute, Section 3282 (26 U. S. C. 307) prohibits the making or fermenting, in any building or on any premises other than a distillery duly authorized according to law, of mash, wort or wash fit for distillation or for the production of spirits or alcohol.

Searches and seizures of contraband articles are to be liberally construed. In *U. S. v. Lefkowitz,* 285 U. S. 452, 465, the Supreme Court said:

> "The decisions of this court distinguish searches of one's house, office, papers, or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia, and illicit liquor, in order to prevent the commission of crime."

It is obvious therefore that the prohibition officers in the instant case were definitely apprised of violations of the two statutes mentioned on the premises prior to their entrance, i. e., that a still was unlawfully in operation on said premises, and that mash was unlawfully being fermented on said premises,

and that either violation entitled the government officers to enter and seize the contraband property irrespective of whether or not the seizure followed an arrest.

There can be no doubt from the testimony that the officers had ample probable cause to believe and did believe that a violation of the laws was taking place in their presence, and that they were not only entitled to enter and arrest such violators, but were duty bound to do so.

The situation is well stated in the concurring opinion in *Mello v. U. S.*, supra, where the court said (p. 137):

> "The prohibition officer summed the whole thing up in his answer to the question, 'Why didn't you go get a search warrant if you knew so surely? A. I didn't figure I needed a search warrant. If I had the evidence to get a search warrant, I had the evidence to seize it without.' It seems to me this sums up the situation."

In passing it should be pointed out that in the *Mello* case, the court denied the petition to suppress on ground of lack of proper party petitioner (and for the same reasons here urged), and the concurring opinion merely adds that the search was justified in any event.

It is obvious from the foregoing, when read in the light of the facts in the present case that, even if appellant was a proper party to question the officers' entry into the 60 Brady Street premises, the entrance

was lawful and violated no constitutional rights of the owner therof.

STATUTES, AND CONSTITUTIONAL AMENDMENTS DISCUSSED IN BRIEF.

AMENDMENT IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. C., Constitution, Part 2, p. 459.

AMENDMENT V.

"No person shall * * * be compelled in any criminal case to be a witness against himself." U. S. C., Constitution, Part 2, p. 504.

SIGNS PUT UP BY DISTILLERS.

"Every person engaged in distilling or rectifying spirits * * * shall place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters, not less than 3 inches in length, painted in oil colors and in a proper and proportionate width, the name or firm of the distiller * * * with the words 'Registered distillery' * * *." R. S. 3279 (26 U. S. C. 303).

MASH, WORT AND VINEGAR.

"No mash, wort or wash, fit for distillation or for the production of spirits or alcohol shall be

made or fermented in any building or on any premises other than a distillery duly authorized according to law * * * and no person other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort or wash * * *." R. S. 3282 (26 U. S. C. 307).

NEW TRIAL: HARMLESS ERROR.

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the party." Sec. 269 Jud. Code (28 U. S. C. 391).